No. 84-68

IN THE

Supreme Court of the United States

KERR-McGEE CORPORATION,

Petitioner,

VS.

THE NAVAJO TRIBE OF INDIANS, *et al.*,

Respondents.

BRIEF OF AMICUS CURIAE

CONOCO INC., ATLANTIC RICHFIELD COMPANY, THE SUPERIOR OIL COMPANY, MARATHON OIL COMPANY AND GETTY OIL COMPANY IN SUPPORT OF REVERSAL

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Brief of Amicus Curiae

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TABLE OF AUTHORITIES CITED

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This amicus curiae brief is in support of the Petition of Kerr-McGee Corporation herein for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. All parties to this litigation through their counsel have given consent to the filing of this brief with the Court.

The companies named above support the reasons given by Petitioner for granting a writ of certiorari herein in Section I and II of its brief (pp. 10 and 12) and no repetition of such arguments is included herein. These points were also urged in the United States District Court for the District of Wyoming by said companies.

Of particular interest and concern to the above-named companies are the matters addressed in Section III of Kerr-McGee's brief (pp. 14 and 16). These are the serious and recurring problems raised by the Ninth Circuit decision concerning fundamental fairness and basic liberties on Indian reservations and

concerning the organization of and federal supervision over Tribal governments.

The Ninth Circuit decision, 731 F.2d 597, leaves oil and gas producers and ultimate consumers at the mercy of the governing body of the Tribes involved. No limit is placed upon the authority of the Tribe to tax, and there is to be no appeal, safeguard or recourse for those subject to the tax.

In *Merrion* v. *Jicarilla Apache Tribe*, 455 U. S. 130 (1982), the matter of the approval required by the Secretary of the Interior under the Constitution adopted by that Tribe was discussed, and the opinion pointed out that this was safeguard enough and that no other was necessary. The decision of the Ninth Circuit in the *Kerr-McGee* case gives to a Tribe which has chosen not to reorganize under the Indian Reorganization Act, 25 U.S.C. § 476, more power and authority than a Tribe which has reorganized under said Act.

The policy underlying the Indian Reorganization Act is to further Indian self government and Indian self sufficiency. If the Ninth Circuit decision is allowed to stand, this congressional policy will be in jeopardy, since there is no real incentive for a Tribe which has reorganized to continue as such.

A further policy of Congress is expressed in the Indian Leasing Act, 25 U.S.C. § 397, which gives the Secretary of the Interior authority to regulate leasing for oil and gas development on tribal reservations. This over-all policy was relied on by two United States District Courts in Arizona (No. CIV 80-247 PHX-WPC) and Utah (No. 79-0140) both involving the Navajo Tribe of Indians who had not reorganized and who had levied a tax on oil and gas production from their reservation. These lower courts found that un-reorganized Tribes must secure Secretarial approval for their tax in the same manner as a reorganized Tribe and based their decisions on a finding that congressional policy as expressed in the Indian Leasing Act gives the Secretary of the Interior authority to determine whether a given action of the

Tribes with respect to oil and gas development is in the best interests of the Tribe involved. There is no question that the Congress may establish policies to be followed in Indian activities.

In the case brought by the above-named companies in the United States District Court for the District of Wyoming, *Conoco Inc., et al.* v. *Shoshone and Arapahoe Tribes*, (No. C80-0181) the requirement of Secretarial approval was urged. The Secretary is a party to said action and it was also requested that he be ordered to promulgate regulations setting forth procedures to be followed in leading to his decision on Indian taxation, with an opportunity for comments from those proposed to be taxed. In this manner, fairness could be achieved. This position recognizes the power of the Tribes to tax oil and gas production as quasi-sovereigns, but asks for some safeguards upon such power. This to these companies seems reasonable and not burdensome upon the Tribes. Otherwise, there can be no assurance that if unrestricted power to tax is given to un-reorganized Tribes, such power will not be abused. The usual safeguards afforded to those proposed to be taxed in the United States do not exist in the case of Indian taxes. A system of safeguards, approved by the United States Supreme Court in the *Merrion* case, *supra*, as being adequate, provides bare minimal due process as to Tribes which have chosen not to reorganize.

Therefore, we respectfully submit that certiorari should be granted in the instant case in order that the Supreme Court may consider this important adjunct issue to the *Merrion* case, *supra*.

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